ORIGINAL

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Reallocation of Television Channels 60-69, the 746-806 MHz Band	)	ET Docket No. 97-157

To: The Commission

REPLY TO APCO OPPOSITION

1. The five-page APCO opposition filed April 6, 1998 does not detract from the merits of the petition for reconsideration filed February 5, 1998 by Lindsay Television, Inc. and Achernar Broadcasting Company, seeking interim protection for the construction and operation of a new analog TV broadcast station on channel 64 at Charlottesville, Virginia, pending conversion to digital service, along with 36 authorized television broadcast facilities on channels 63-64-68-69 throughout the nation.

2. APCO's opposition, at 3-4, alleges that in the Balanced Budget Act of 1997 and the related conference report "there is nothing to suggest that Congress intended that entirely new analog stations be permitted in the band." What statute and conference report are APCO reading?

(a) The Balanced Budget Act of 1997 granted the right to certain applicants having pending mutually-exclusive applications for new television broadcast stations to settle their comparative cases so long as the settlement was filed within 180 days of enactment of the legislation. Lindsay and Achernar availed themselves of that right, settling a 12-year proceeding resolving

a unique impasse with the National Radio Astronomy Observatory on remand from the Court of Appeals.[1] All provisions of a statute are to be considered, giving effect to the entire regulatory scheme. United States v. Storer, 351 U.S. 192, 203-04 (1956), cited by APCO at 5; e.g., also, Philbrook v. Glodgett, 421 U.S. 707, 713 (1975). With regard to the Balanced Budget Act of 1997, this is accomplished by honoring the Lindsay-Achernar settlement coupled with their obligation to terminate analog operation under the digital conversion timetable.

(b) The conference report explicitly acknowledges that "new commercial licensees" may be created in the 60-69 frequency bands. APCO claims that Congress was referring only to "new commercial licensees" in the 60-61-62-65-66-67 frequencies and that Congress was not referring to "new commercial licensees" in the 63-64-68-69 frequencies. This is not what the conference report says. The conference report says that "...for the period during the transition, the Commission will ensure that full-power digital and analog licensees will operate free of interference from public safety service licensees," and vice versa, without any limitation on the frequency bands to which this intention is directed.

3. The opposition, at 4-5, purports to address the impact of a grant of the Lindsay-Achernar petition on public safety services:

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[1] Davis Television, LLC, also relies on a settlement under this statutory provision in its petition at 6-7.

(a) APCO lists pending applications for new stations on channels 63-64-68-69 that are adjacent to 11 metropolitan areas in the nation, but does not include Charlottesville channel 64 in that listing, and makes no showing that a channel 64 operation in Charlottesville would cause cognizable interference to any of the listed communities. In fact, APCO's assertions are wholly unsupported by any engineering statement or affidavit of support.

(b) APCO alleges that there are existing shortages of spectrum in "many less densely populated areas," but does not identify Charlottesville as such an area. Surely, APCO has access to such information and if Charlottesville currently experiences a shortage of spectrum for public safety needs, APCO would have mentioned that.

(c) APCO refers to the "likely" future use of the new spectrum for wide-area systems in various states, including Virginia, and to future use of the new spectrum for major emergencies. No other particulars are given. The timetable for these new uses is not addressed, an important omission in light of the Commission's acknowledgement that equipment for the new spectrum will not even be designed or manufactured until after a further Commission rulemaking proceeding to adopt technical standards. Development of Operational, Technical and Spectrum Requirements, 12 FCC Rcd 17706 (1997). APCO does not address the impact on the Commonwealth of Virginia with any precision. For good reason. On all of the channels 63-64-68-69, there is but a single existing authorized full power television station in the

entire Commonwealth of Virginia. This is channel 68, at Grundy, in the mountainous area in southwestern Virginia adjacent to the Tennessee border, Notice of Proposed Rule Naking in the instant docket, 12 FCC Rcd 14141, 14164-67, 14171-72 and related maps (1997), to which would be added channel 64, at Charlottesville, in the mountainous central western part of Virginia.

4. The opposition, at 5, attempts to respond to our argument that the Commission is required to consider a "reasonable alternative" to an unyielding application of a new regulation without regard to the equities and public interest benefits of a grant of the Lindsay-Achernar petition:

(a) Amendment of Parts 2, 73, and 90 of the Commission's Rules and Regulations to Allocate Additional Channels in the Band 470-512 MHz for Public Safety and Other Land Mobile Services, 59 RR2d 910 (1986) is a strange case for APCO to cite. There, the Commission allocated channel 16 for public safety in the Los Angeles metropolitan area based on an explicit record of a present, dire shortage of existing spectrum for that purpose and based on the ability of the Commission to provide an alternative channel for the parties who had applied for a new television station on channel 16. Here, the Commission's action would wipe out channel 64 allocated to Charlottesville without a shred of evidence of an existing shortage of spectrum for public safety purposes and with no assurance of the availability of a substitute channel for television broadcasting.

(b) Multi-State Communications, Inc., 728 F.2d 1519

(D.C.Cir. 1984) upheld a statutory provision which mandated the grant of a license renewal to an applicant who provided the first local television service licensed in a state which did not have a licensed television station (i.e., New Jersey and Delaware), denying a "new station application" challenging the license renewal application of a television station agreeing to move from New York City to Secaucus, New Jersey. There, the will of Congress was that (i) New Jersey get its first licensed television station and (ii) the impeding challenging application be dismissed. Here, the will of Congress is that (i) the settlement of new station applications such as those for channel 64 at Charlottesville be honored by the Commission and (ii) operation on channel 64 be subject to termination in due course under other conditions established in the same Act.

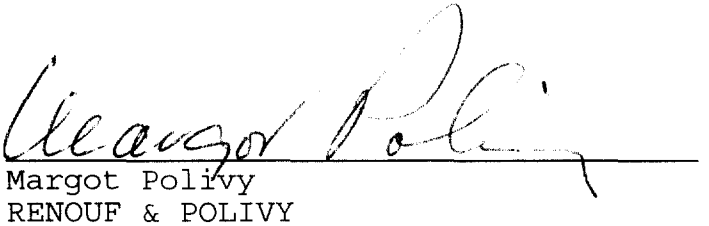
(c) In National Ass'n of Broadcasters v. FCC (identifed as Direct Broadcast Satellites in passage quoted by APCO), 740 F.2d 1190 (D.C.Cir. 1984), the Commission determined it was necessary to devote certain specific spectrum to a new satellite service because of international usage patterns involving the same spectrum, and adopted a plan ultimately to delete existing authorizations in the spectrum in question without discrimination amongst the affected parties. The Court upheld this action in which the existing parties were given a minimum five-year transition period, following which they still could continue to operate on their frequencies until displaced by a newly-licensed satellite station; also, the record reflected the apparent

availability of sufficient other spectrum to be assigned to the existing parties, following an expedited reallocation rulemaking proceeding to be conducted by the FCC. 740 F2d at 1209-14. Here, although a similar transition period is available and contemplated under the Balanced Budget Act of 1997, the Commission has declined to employ it.

(d) In United States v. Storer, 351 U.S. 192, 202-203 (1956), the Court upheld FCC multiple ownership regulations limiting the number of television broadcast stations owned by the same party to five, overriding and dismissing Storer's pending application for a sixth station. The Court held that these regulations were reconcilable with the Communications Act, which must be read as a whole, and that Storer's application in question was filed with knowledge of the Commission's attidude toward concentration of control, citing the Court's decision upholding the chain broadcasting regulations as overriding pending applications, National Broadcasting Co. v. United States, 319 U.S. 190 (1943). Here, channel 64 has been allocated to Charlottesville on the television table of assignments for 46 years since the Sixth Report and Order, 41 FCC 148, 447-48 adopted in 1952. When Lindsay and Achernar filed their applications for the channel in 1986, they did not have the prescience to know that the proceeding on their applications would be interminable and that the channel eventually would be caught up in a conversion to public safety use, albeit over a multi-year timetable, 12 years later in 1998.

5. Charlottesville's need for a second local service, identified by the Commission in 1952, has only grown more pressing in the intervening years. Satisfaction of that need is now immediately possible; would further rather than inhibit the controlling legislative purpose; and remains within the Commission's discretion without damage to the overall plan for the affected channel. Both equity and the public interest demand such action on these facts and nothing in APCO's pleading alters the case. Rigid adherence to the letter of a waivable policy here would simply elevate form over substance with no rational basis.

Respectfully submitted,



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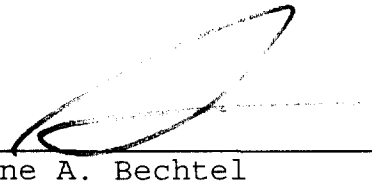

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April 16, 1998

CERTIFICATE OF SERVICE

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